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In the Court of Criminal
Appeals of Texas

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

DEONDRE JENKINS,
Appellant-Respondent
v.
THE STATE OF TEXAS,
Appellee-Petitioner

On Petition for Discretionary Review
State's Brief on the Merits
Fourth Court of Appeals, San Antonio, Texas
No. 04-17-00114-CR

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IDENTITY OF THE PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 68.4(f), the parties to this case are as follows:

- (1) **Deondre Javqueen Jenkins**, is the appellant and was the defendant in the trial court.
- (2) The **State of Texas**, by and through the Bexar County District Attorney's Office, Paul Elizondo Tower, 101 W. Nueva, San Antonio, Texas, is the Appellee and prosecuted this case in the trial court.

The trial attorneys were as follows:

- (1) The **State of Texas** was represented by **Nicholas "Nico" LaHood**, District Attorney, **David Lunan**, and **Alessandra Cranshaw**, Assistant District Attorneys, Paul Elizondo Tower, 101. W. Nueva, San Antonio, Texas 78205.
- (2) **Deondre Javqueen Jenkins** was represented by **Ross Rodriguez**, 325 S. Flores St., San Antonio, Texas 78204, State Bar. No. 24025756.

The trial judge was **Hon. W.C. Kirkendall, sitting by assignment in the 186th Judicial District**, Cadena-Reeves Justice Center, 300 Dolorosa, 3rd Floor, San Antonio, Texas 78205.

The appellate attorneys to the Fourth Court and Court of Criminal Appeals are as follows:

- (1) **Deondre Javqueen Jenkins** is represented by **Debra Parker**, 111 Soledad, Ste. 300, San Antonio, Texas 78205, State Bar. No. 00794112.
- (2) The **State of Texas** is represented by **Nicholas "Nico" LaHood**, District Attorney, and **Laura Durbin**, Assistant District Attorney, State Bar No. 24068556, Paul Elizondo Tower, 101 W. Nueva, San Antonio, Texas 78205.

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TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

Now comes, Nicholas “Nico” LaHood, Criminal District Attorney of Bexar County, Texas, by and through his undersigned Assistant Criminal District Attorney, and files this Brief of the Merits on Petition for Discretionary Review.

STATEMENT OF THE CASE

Deondre Jenkins (Appellant) was convicted of continuously trafficking, for the purpose of prostitution, sixteen- year-old B.H. and twenty-one-year-old G.S. TEX. PENAL CODE ANN. § 20A.03. On the second day of trial, Jenkins argued for the first time the indictment was fatally defective under the Texas Constitution because it did not charge a “person.”

On appeal, he claimed his conviction was void because the indictment failed to include his name. The court of appeals agreed in a published opinion, and reversed and remanded the case to the trial court with instructions to dismiss the indictment. *Jenkins v. State*, 537 S.W.3d. 696 (Tex. App—San Antonio 2017, pet. granted).

The State did not file a motion for rehearing. The State filed a Petition for Discretionary Review on January 22, 2018. This Court granted the petition on April 18, 2018 and ordered briefing.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and denied.

ISSUES PRESENTED

1. Does a charging instrument that does not identify the defendant by name, but which is preceded by a caption that does identify the defendant by name, meet the jurisdictional requirement that a charging instrument name a “person” as required by article V, § 12(b) of the Texas Constitution?
2. Whether *Cook v. State* is outdated in light of *Teal v. State* and *Kirkpatrick v. State*?

STATEMENT OF THE FACTS

The facts are not integral to the issues before the Court. Therefore, the State will give a brief factual summary.

B.H., a sixteen year old runaway, met Jenkins through Facebook. (3 RR 15-16). The two met in Austin and Jenkins proposed he place B.H. on Backpage.com to prostitute her. (3 RR 18-19). The same day as their first meeting, Jenkins uploaded pictures on Backpage.com and B.H. began meeting Johns in Austin. (3 RR 23). B.H. also met 21 year old G.S., another woman that Jenkins was prostituting through Backpage.com. (3 RR 21). The three traveled to San Antonio to continue prostituting and in a few days made thousands of dollars. (3 RR 35).

The three eventually traveled to Jenkins's hometown, Milwaukee. (3 RR 37). In Milwaukee, law enforcement took custody of B.H. (3 RR 42). Jenkins was eventually arrested and charged with continuous trafficking of both B.H. and G.S.

SUMMARY OF THE ARGUMENT

The indictment returned against Jenkins was a constitutionally valid indictment that vested the trial court with jurisdiction. The one page indictment identified Jenkins as the defendant in the first line. The lower court failed to consider more recent opinions of this Court when reviewing the indictment.

Pursuant to *Teal v. State*, 230 S.W.3d 172 (Tex. Crim. App. 2007), and *Kirkpatrick v. State*, 279 S.W.3d 324 (Tex. Crim. App. 2009), the court must consider the whole indictment to determine if it is constitutionally valid. Reviewing the whole indictment, the trial court and the defendant could easily ascertain Jenkins was the defendant charged with continuous trafficking. The lower court's reliance on *Cook v. State*, 902 S.W.2d 471 (Tex. Crim. App. 1995) was misplaced. In light of the more recent cases, *Cook* should be overturned. If not overturned, *Cook* should be distinguished.

ARGUMENT

An indictment is a written instrument presented to a court by a grand jury charging a (1) person with (2) the commission of an offense. TEX. CONST. art. V, § 12(b). It is undisputed that the indictment charging Jenkins with trafficking of persons did not identify him by name in the body, but identified him by name in the caption. Specifically:

Defendant: DEONDRE J JENKINS
JN #: 1573311-1
CLERK'S ORIGINAL



Address: 2469N N 37TH ST, MILWAUKEE, WI 53210-3045

Complainant: [REDACTED]

CoDefendants:

581189

Offense Code/Charge: Continuous Trafficking of Persons—25-Life

GJ: 572027

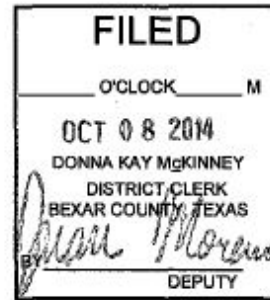
PH Court:

Court #: 1860

SID #: 1008391

Cause #: 2014 CR 8396

Witness: State's Attorney



TRUE BILL OF INDICTMENT


IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empanelled and sworn as such at the September term, A.D., 2014, of the 186 Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment:

Count I

on or about the 15th day of February, 2012, through the 15th day of December, 2013, a period of thirty days or more in duration, in Bexar County, Texas, the defendant engaged two or more times in conduct that constitutes an offense under Section 20A.02--Trafficking of Persons against [REDACTED] and [REDACTED]; in that

1. The defendant knowingly trafficked [REDACTED] and through force, fraud or coercion, caused [REDACTED] to engage in conduct prohibited by Section 43.02--Prostitution; and
2. The defendant knowingly received a benefit from participating in a venture that involved trafficking [REDACTED] and through force, fraud and coercion caused her to engage in conduct prohibited by Section 43.02--Prostitution; and
3. The defendant knowingly trafficked [REDACTED], a child, and by any means caused [REDACTED] to engage in or become the victim of conduct prohibited by Section 43.05--Compelling Prostitution; and
4. The defendant knowingly received a benefit from participating in a venture that involved trafficking [REDACTED], a child, and by any means caused [REDACTED] to engage in or become the victim of conduct prohibited by Section 43.05--Compelling Prostitution;

AGAINST THE PEACE AND DIGNITY OF THE STATE.


Foreman of the Grand Jury

INDICTMENT – CLERK'S ORIGINAL

The Fourth Court of Appeals, following this Court's holding in *Cook v. State*, reversed Jenkins's judgment of conviction and remanded the cause to the trial court to dismiss the indictment. The State now asks this Court to overturn *Cook*, or at the very least distinguish *Cook*.

1. Standard of Review

The sufficiency of an indictment is a question of law and reviewed de novo. *Smith v. State*, 297 S.W.3d 260, 297 (Tex. Crim. App. 2009)

2. The 1985 Amendments

In 1985, the Legislature proposed various amendments to the Code of Criminal Procedure and a constitutional amendment. *Studer v. State*, 799 S.W.2d 263, 265-268 (Tex. Crim. App. 1990). The goal of the reform was to end the practice of defendants raising substantive defects after jeopardy had attached and for the first time on appeal. *Teal*, 230 S.W.3d at 175. Voters approved a constitutional amendment which defined an "indictment" and "information." TEX. CONST. art. V, §12(b). Specifically, the Texas Constitution defines an indictment as:

An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense...The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment

of an indictment or information the court invests the court with jurisdiction of the cause.

Id.

In addition to the constitutional amendment, article 1.14 was added to the Code of Criminal Procedure. Article 1.14 requires a defendant to objection to a defect, error, or irregularity in the form or substance in an indictment before trial commences, otherwise the defendant waives any error. TEX. CODE CRIM. P. ANN. art. 1.14(b).

3. Studer and Cook's assessment of the amendments

In *Studer v. State*, this Court addressed the changes to the constitution and statutes for the first time. *Studer*, 799 S.W.2d at 268. In *Studer*, the information charging the defendant with indecent exposure failed to allege a reckless act. *Id.* at 265. The defendant lodged no objection to the error and pled no contest. *Id.* at 264. On appeal, he argued the information was fatally deficient because it failed to charge him with an offense as required by the constitution. *Id.* at 265. This Court held the amendments made the specifics of an indictment statutory requirements, not constitutional. *Id.* at 272. Therefore, most substantive defects could be waived if not objected to under Article 1.14(b). *Id.* at 273.

However, five years later, in a plurality opinion, the Court retreated from *Studer*. *Cook*, 902 S.W.2d at 474. In *Cook*, the indictment failed to name the

defendant.¹ *Id.* at 474. The Court noted that while the constitutional amendment was “clearly intended to eliminate the requirement that an indictment charge every element of an offense, it is equally apparent that neither the Legislature nor the voters intended to abrogate the constitutional right to a charging instrument sufficient to constitute an indictment.” *Id.* at 478. An indictment which failed to charge a person was not an indictment and cannot vest the trial court with jurisdiction. *Id.* at 480; *see also Ex parte Patterson*, 902 S.W.2d 487, 488 (Tex. Crim. App. 1995) (opinion delivered same day as *Cook* holding that charging instrument’s failure to charge a person with the commission of an offense renders it constitutionally invalid); *Duron v State*, 956 S.W.2d 547, 550 (Tex. Crim. App. 1997) (reaffirming *Cook* - noting that not all indictment defects are matters of substance that a defendant must object to them before trial). The defendant was not required to object under 1.14(b). *Id.* at 479.

4. Teal and Kirkpatrick and the “whole indictment” test

In 2007, the Court again revisited the requisites of an indictment. *Teal*, 230 S.Wd.3d at 173. The *Teal* indictment charged the defendant with a misdemeanor offense who subsequently objected after the jury was impaneled that the district court did not have jurisdiction. *Id.* at 174. The Court rejected that argument and reaffirmed that the Texas Constitution requires that an indictment allege (1) a

¹ The opinion does not discuss whether the defendant was identified in the caption.

person, (2) committed an offense.² *Id.* at 179. The defendant was charged with an offense and therefore it was an indictment and constitutionally sufficient. *Id.* at 181-182.

Teal further held “the complete test for constitutional sufficiency of a particular charging instrument goes slightly further than that expressly set out in *Studer* and *Cook*: Can the district court and the defendant determine, from the face of the indictment, that the indictment intends to charge a felony or other offense for which a district court has jurisdiction.” *Id.* at 181.

In *Kirkpatrick v. State*, the Court followed *Teal* and considered the entire charging instrument. *Kirkpatrick*, 279 S.W.3d at 328. In *Kirkpatrick*, the state charged the defendant in one indictment with “forgery and tampering with a governmental record in three counts.” *Id.* at 324. In another indictment, a single count charged the defendant with tampering with a governmental record by making a document. *Id.* at 325. On appeal, the defendant argued the trial court lacked jurisdiction because the defendant had been indicted for a misdemeanor and not a felony offense for which the district court would have jurisdiction. *Id.* at 325.

The *Kirkpatrick* Court rejected that argument and found that “although the indictment properly charged a misdemeanor and lacked an element necessary to charge a felony, the felony offense existed, and the indictment’s return in a felony

² The *Teal* court explicitly stated that in *Cook* no person was alleged to have committed an offense and therefore the indictment was fatally flawed. *Id.* at 178-79.

court put appellant on notice that the charging of the felony offense was intended.” *Id.* at 329. The Court noted the face of each indictment contained the heading: “Indictment – Tampering with a Governmental Record 3rd Degree Felony, - Tex. Penal Code Ann. 37.10(a)-Code 73990275.” *Id.* The Court further reasoned the “Penal Code section was easily ascertainable, and the notation that the offense was a third degree clearly indicated that the state intended to charge a felony offense and that the district court had subject matter jurisdiction.” *Id.* In short, viewing the whole indictment, the state intended to charge a felony and the district court had subject-matter jurisdiction. *Id.*

5. Following Teal and Kirkpatrick, the charging instrument is a constitutionally valid indictment

Since *Teal* and *Kirkpatrick*, the Court of Criminal Appeals has not considered whether a charging instrument that does not identify the defendant by name, but which is preceded by a caption that does identify the defendant by name, is constitutionally sufficient. The indictment returned against Jenkins was a constitutionally valid indictment. The top line of the one page indictment identified Deondre Jenkins as the defendant. The lower court refused to consider the caption citing that it was not part of the charging instrument. *See Stansbury v. State*, 128 Tex. Crim. 570, 574, 82 S.W.2d 962, 964 (1935)(stating “the caption is really no part of the indictment proper”); *Adams v. State*, 222 S.W.3d 37, 52 (Tex. App.—Austin 2007, pet ref’d)(a mistake in the caption did not render the

indictment void because the caption is not part of the indictment). It further distinguished *Kirkpatrick* because the Court was only considering the second prong of the constitutional definition, whether the indictment sufficiently alleged an offense.³ The lower court is correct: the caption is not part of the indictment and *Kirkpatrick* only considered the second prong of the constitutional definition. Nonetheless, the lower court ultimately failed to consider the whole indictment as set forth in *Teal*.

“The legislature’s purpose in amending the constitution and statutes was to change the focus from ‘whether a defect is fundamental’ to ‘whether the defendant brought the defect to the court’s attention.’” *Teal*, 230 S.W.2d at 177; *see also Bolton v. State*, No. 09-01-476-CR, 2002 WL 31487325, *7 (Tex. App.—Beaumont, Aug. 22, 2002, no pet.) (mem. op., not designated for publication) (holding in an unpublished opinion that a written instrument which failed to name the defendant in the second count on the second page of the two page indictment was a valid indictment under the constitution because he was named in the caption and the first count). The grand jury returned an indictment against Jenkins and, upon its presentment, invoked the jurisdiction of the trial court. After its

³ The lower court further distinguished *Kirkpatrick* noting “with regard to the court’s discussion of a heading or caption, the court was considering whether the defendant had adequate notice.” *Jenkins*, 04-17-00144-CR at 16-17. However, a review of *Kirkpatrick* shows the Court considering the caption among other items to determine the “state intended to charge a felony offense and that the district court had subject-matter jurisdiction.” *Kirkpatrick*, 279 S.W.3d at 329.

presentment, jurisdiction was not contingent on whether the indictment contained defects of substance. Neither the district court, Jenkins, nor his defense counsel showed any confusion that he was the person named in the caption that was charged with a felony:

- the grand jury returned an indictment which identified him by name;
- a magistrate informed him of the charges against him;
- he was served with a copy of the indictment on February 20, 2015;
- he filed a motion to quash the indictment which failed to object to the lack of his name appearing in the indictment language;
- the State read the charges against him and he entered a plea of not guilty in front of a jury; and,
- four witnesses identified him as the defendant (3 RR 21, 109, 164, 186).

Every action taken by the court and Jenkins suggest there was no confusion that he was the named defendant in the indictment charging him with continuous trafficking of persons.

The same could have been said for Cook. A grand jury returned an indictment, the indictment was presented in a district court, the defendant was arraigned, a jury was selected, he was found guilty and pled “true” to an enhancement contained within the indictment. There was no confusion about who the defendant was; however, the opinion never discusses the caption and whether

or not Cook was identified as the defendant like Jenkins. For that reason, *Cook*, at the very least, is distinguishable.

6. *Jenkins waived error when he failed to objection pursuant to art. 1.14(b)*

The indictment returned by the grand jury and presented to the district court was constitutionally adequate. Any objection to the indictment's failure to include Jenkins name in the formal charging language should have been made prior to the commencement of trial. TEX. CODE OF CRIM. PROC. ANN. arts. 1.14(b); 21.02. No objection was made and therefore error is waived. TEX. R. APP. P. 33.1. However, only after the jury was sworn and the majority of the State's case was presented did he object. Jenkins engaged in, and the lower court condoned the very practice the amendments sought to abolish.

7. *Cook is now an outdated outlier*

Cook v. State should be overturned. Considering *Studer*, *Teal*, and *Kirkpatrick*, *Cook* is a retreat back to the interpretation of indictment defects prior to 1985. An indictment serves two functions: (1) to provide notice to the defendant and (2) to vest the trial court with jurisdiction. *Cook*, 902 S.W.2d at 475. Article V, § 12 established the filing of an indictment that charges a person with an offense vested the trial court with jurisdiction.

In *Studer*, the Court established that the specific requisites, like the elements, were statutory and not constitutional. Specifically the Court reasoned "the change

in Art. 1.14(b) requires, among other things, that substance exceptions be raised pre-trial or otherwise the accused has forfeited his right to raise the objection on appeal or by collateral attack. If omitting an element from an indictment is still a defect of substance in an indictment, it naturally follows that the indictment is still an indictment despite the omission of that element.” *Studer*, 799 S.W.2d at 268.

Cook departed from the intention of the amendments. Article 21.02 sets forth the statutory requirements of an indictment, including that the indictment name the defendant or contain an adequate description if his name is unknown. TEX. CODE CRIM. P. ANN. ART. § 21.02. The indictment in *Cook* was statutorily erroneous, but it was still an indictment that vested the trial court with jurisdiction under *Studer*’s rationale.

Unquestionably, the indictment that charged Jenkins with continuous trafficking was statutorily insufficient, but nonetheless an indictment that vested the trial court with jurisdiction upon its presentment.

Both *Cook* and the lower court failed to distinguish the effect the Article V, § 12 and article 1.14 had on defective indictments.⁴ It has been established, both before and after *Cook*, a defective indictment no longer strip the trial court of jurisdiction, but rather is subjected to article 1.14(b).

⁴ “When Art. V., § 12 is read in conjunction with the code provisions regulating the practices and procedures governing charging instruments, it is clear the amendment to Art. 1.14 did not change what constitutes a substance defect, but rather only the effect.” *Studer*, 799 S.W.2d at 268.

Cook is outdated in light of the “whole indictment” test. If the court can look at the whole indictment to determine whether an offense was charged, the same court can certainly look at the whole indictment to determine if a person was charged. The indictment charged Deondre Jenkins.

Even if the Court chooses not to overturn *Cook*, it can distinguish *Cook*. An indictment which fails to charge a person is not an indictment under the Texas Constitution. The State agrees that if a defendant is never identified anywhere in the indictment, a person has not been charged and the indictment is not valid. Following the *Cook* opinion, this is what occurred. However, the same is not true for the indictment that charged Jenkins. As discussed, *Cook* never considered the caption. It is clear is identified as the defendant and the trial court was presented with a valid indictment which vested it with jurisdiction over the matter.

PRAYER FOR RELIEF

The State prays this Honorable Court reverse the court of appeals and reinstate the judgement of the trial court.

Respectfully submitted,

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/s/ Laura E. Durbin

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Laura E. Durbin, hereby certify that the total number of words in this brief is 2,832. I also certify that a true and correct copy of this petition for discretionary review was emailed to Debra Parker, at Debraparkerlaw@gmail.com, counsel for Deondre Jenkins, and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 1st day of June, 2018.

/s/Laura E. Durbin

Laura E. Durbin
Assistant Criminal District Attorney

Attorney for the State